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No. 90-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE TORO COMPANY,

Petitioner,

v.

WHIPPLE VAN NESS JONES, JR.,
and MARYANN CAUSSEAUX JONES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Toro Company's statement of the case omits some of the facts and proceedings relevant to this court's consideration of whether to grant a writ of certiorari.

Plaintiff Van Jones suffered severe burns in a fire that occurred while he was refueling his $9,000 Toro riding lawnmower. (R. vol. 5 at 3-4, 36-38, 52; R. vol. 4 at 34-36, 55-56). All experts agreed that this was not "spontaneous combustion" but that there was a specific cause

of the fire. (E.g., R. vol. 6 at 37, 120, 146; R. vol. 7 at 142-43, 174; R. vol. 8 at 109, 196). Expert testimony established three possible causes.

First, Toro placed an air filter (which used a whirling motion that created static electricity) next to the fuel tank, where a static electricity spark could ignite a fire during the refueling process. (R. vol. 6 at 145-46). Second, Toro placed a "traction switch" in the area below the tank (where heavier-than-air gas fumes would reach it) and unnecessarily wired the switch on the "hot side" of the battery, so that there was power to the switch even when the mower was turned off; this created a risk of sparking and resulting fire during the refueling process. (R. vol. 6 at 16-17, 21-22, 56, 65, 146-49). And third, according to Toro's own expert, the hottest parts of the mower continued to get hotter after it was turned off, creating a risk of fire if refueled "ten minutes after, or an hour after" the mower was turned off. (R. vol. 8 at 46).

Toro's warning on the mower said simply: "Stop engine before adding fuel." (R. vol. 5 at 59-60; R. vol. 7 at 27-28). The warning did not advise the user to wait at least an hour (as Toro's own expert said was appropriate), or to wait any period at all, between turning the mower off and refueling it. (*Id.*). On the day at issue, Mr. Jones complied with Toro's warning, refueling the mower some five to 15 minutes after turning it off. (R. vol. 5 at 60, 64; R. vol. 7 at 28). According to Toro's own expert, this is what caused the fire. (R. vol. 8 at 38, 46, 98; see also R. vol. 4 at 38; R. vol. 5 at 60; R. vol. 7 at 28).

In addition, Toro gave no warning of the static electricity risk created by the air filter and no instructions concerning the easy steps by which a user could discharge the static and thus avoid the risk of fire. (R. vol. 5 at 59, 81-82). Mr. and Mrs. Jones presented expert testimony that this caused the fire. (R. vol. 6 at 120, 146, 75).

The Joneses sued Toro in two counts: strict liability and negligence. As submitted to the jury, both counts addressed Toro's design and manufacture of the mower. In addition, the negligence count (but not the strict liability count) addressed the improper warnings. The warning issue was submitted to the jury *only* on the negligence count, not on the strict liability count. (R. vol. 9 at 113).

Toro did not move for a directed verdict on the warning issue. (R. vol. 9 at 12). Toro did not object to submission of the warning issue to the jury. (*Id.*). Toro did not object to the jury instructions on the warning issue. (R. vol. 9 at 13-22).

Without objection, the court instructed the jury that the strict liability and negligence counts should be considered separately. (R. vol. 9 at 114). The court instructed the jury on the differing requirements of Florida law regarding the two legal theories; in Florida, these distinct causes of action require proof of different elements, as the instructions noted. (R. vol. 9 at 114-16). The court instructed the jury, without objection, that its verdict would be for the Joneses if the jury found for the Joneses on *either* of the two separate theories. (R. vol. 9 at 116).

Without objection, the verdict form included an ultimate question to the jury on the strict liability count and an ultimate question on the negligence count. (Petition App. 6a). These questions were intended to determine the winner on each count without any indication of the jury's underlying reasoning. Three additional questions dealt with subsidiary issues: Toro's claim that Mr. Jones was comparatively negligent, the apportionment of negligence if both Toro and Mr. Jones were found negligent, and the amount of damages. (*Id.*).

The jury returned its verdict for the Joneses on the negligence count and for Toro on the strict liability

count. Toro made no claim at that time that the verdict was inconsistent in any respect. (R. vol. 3, tab 115 at 5). Without objection, the jury was discharged. (*Id.*). Judgment was entered on the verdict. (R. vol. 3 at 108).

Thereafter, Toro moved for a new trial, asserting (among other things) that the verdict was inconsistent. The district court denied the motion.

Toro appealed. In its initial brief in the Eleventh Circuit, Toro did not raise alleged inconsistency of the verdict as a basis for reversal. Toro framed the issues as follows:

> Appellant, The Toro Company ("Toro"), raises the following issues on appeal:
>
> 1. Whether the trial judge abused his discretion in denying Toro's motion for a new trial given that the jury verdict was not sustainable under any legal theory or under the facts presented at trial?
> 2. Whether the trial judge abused his discretion in denying Toro's motion for a new trial where the jury instructions were reasonably calculated to confuse or mislead the jury?
> 3. Whether the trial judge's vague and confusing instruction to the jury and his denial of Toro's motion for a new trial violated Toro's due process rights?

Appellant's Brief in Eleventh Circuit, page 1.

In response to Toro's brief, the Joneses cited the overwhelming record evidence of Toro's negligence, including (but not limited to) the evidence that Toro negligently failed to warn Mr. Jones not to refuel the mower within an hour after turning it off. The Joneses noted further that Toro had not even moved for a directed verdict at the close of all the evidence; Toro's claim that the evidence was insufficient thus was not properly before the court. Only then, in its reply brief, did Toro alter its

framing of the issue to assert that the verdict was inconsistent.

The Eleventh Circuit affirmed per curiam in a brief, "Do Not Publish" opinion.[1] Responding to the contention in Toro's reply brief that the verdict was inconsistent, the court said:

> Toro argues that this verdict was inconsistent because there was no evidence in the record to support a finding of negligence absent a design defect. *Because the case also presents a question about certain warnings that ought to have been given by Toro, we doubt that the verdict was inconsistent* . . . .

Opinion at 2 (emphasis added). The court then said it did not need to decide the inconsistency issue because Toro had waived any claim of inconsistency by failing to raise the issue prior to the jury's dicharge.

Toro did not move for rehearing or rehearing en banc.

Toro did move, first in the district court and then in the Eleventh Circuit, for a stay of execution pending this court's review of Toro's petition for a writ of certiorari. In the Eleventh Circuit, Toro filed a copy of its petition, as filed in this court, and Toro argued that this court allegedly is likely to grant the writ. The Joneses noted in response that the verdict was not inconsistent. The Eleventh Circuit, which had reviewed the record and had said in its opinion that it "doubt[ed]" the verdict was inconsistent, summarily denied Toro's motion for a stay of execution, notwithstanding Toro's filing of a supersedeas bond.

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[1] The decision not to publish an opinion reflects the panel's view that the decision "ha[s] no precedential value." See Eleventh Circuit Internal Operating Procedures on Local Rule 36, paragraph 3 (reprinted in Florida Rules of Court—Federal at page 64 (West 1990)).

SUMMARY OF ARGUMENT

Toro is correct that there is a split in the circuits concerning whether a party waives, by failure to raise the issue prior to discharge of the jury, any objection to inconsistencies in a jury's answer to *factual* questions included in a *Rule 49(a)* special verdict. Toro is incorrect, however, in asserting that that issue is well presented in this case. Toro also is incorrect when it asserts that the issue affects constitutional rights or is sufficiently important to warrant this court's review.

First, this verdict was not inconsistent. The question Toro raises thus will have no effect on the ultimate outcome of this case, regardless of how it is resolved.

Second, this was a Rule 49(b) verdict, not a Rule 49 (a) verdict. The law is clear—and even Toro appears to agree—that any alleged inconsistency in a Rule 49(b) verdict is waived if not raised prior to discharge of the jury.

Third, the inconsistency issue was not raised in Toro's initial brief in the Eleventh Circuit and thus was not fully addressed there.

Fourth, the Eleventh Circuit waiver rule is clearly correct.

Fifth, the issue has no constitutional overtones and is not sufficiently important to warrant this court's review.

REASONS FOR DENYING THE WRIT

I. THE VERDICT WAS NOT INCONSISTENT

Toro has admitted that allegedly inconsistent verdicts must be reconciled if at all possible. See Petition for Writ of Certiorari at 7-8. Here reconciliation is not only possible but easy and obvious.

The *uncontested* evidence at trial was that (i) Toro placed on the mower the warning "Stop engine before adding fuel," without any suggestion that any delay was advisable between turning the engine off and refueling, and (ii) Mr. Jones complied with this warning. (R. vol. 5 at 59-60; R. vol. 7 at 27-28). Toro's own expert testified, however, that because the hottest parts of the mower initially get hotter after it is turned off, the mower should not be refueled "ten minutes after, or an hour after" the mower is turned off. (R. vol. 8 at 46). His testimony was that Mr. Jones's failure to wait longer was what caused this fire. (R. vol. 8 at 38, 46, 98; see also R. vol. 4 at 38). The jury was entitled to believe this.[2]

It is clear—and cannot reasonably be contested—that (i) the warning issue was raised in the pleadings and litigated at the trial, (ii) Toro never moved for a directed verdict on the warning issue or otherwise objected to submission of the warning issue to the jury, (iii) the court instructed the jury on the warning issue without objection from Toro, (iv) the warning issue was sub-

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[2] The jury also was entitled to find, alternatively, that a static electricity spark caused the fire, as a different expert testified. The jury could have found that use of this type air filter and its placement next to the fuel tank served an important function and therefore was not a "defect" under the court's uncontested jury instructions on the strict liability count. The jury also could have found, however, that Toro was negligent for failing to warn of the easy procedures necessary to eliminate the risk of a static spark during refueling. The jury thus could have found Toro negligent for failure to provide adequate warnings, even though there was no "defect."

mitted to the jury on the negligence count only, not on the strict liability count, (v) Toro never asserted prior to entry of judgment that there was insufficient evidence of negligent warnings, and (vi) if the jury found the warnings negligent, its verdict was entirely consistent.[3]

Even aside from the warning issue, the verdict was not inconsistent. In Florida, causes of action for strict liability and negligence require proof of distinct elements. As the district court instructed the jury, without objection, these were separate counts requiring application of different standards.[4]

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[3] There was no contention that the temperature of the mower constituted an "unreasonably dangerous" condition that would render Toro strictly liable. The temperature of the mower was an issue only with respect to the warning, which in turn was an issue only on the negligence count. See also footnote 2, supra.

[4] In some specific factual contexts (such as a simple case where a ladder either failed or didn't), proof of a "defect" as defined in Florida law and proof of negligent design or manufacture will stand or fall together. That is not always so, however, and the only case cited by Toro on this subject explicitly says that "defect" and negligence must coexist only "[i]n *some* cases." Consolidated Aluminum Corp. v. Braun, 447 So.2d 391, 392 (Fla. Dist. Ct. App.) (emphasis added), review denied, 455 So.2d 1033 (Fla. 1984). Contrary to Toro's assertion, no Florida case holds that a finding of no defect is in all circumstances inconsistent with a finding of negligent design or manufacture. On the contrary, the Florida Supreme Court has adopted standard jury instructions giving distinct standards for these separate causes of action. Compare Florida Standard Jury Instruction 4.1 (negligence) with Florida Standard Jury Instructions PL 4 and 5 (strict product liability, including detailed prerequisites for a finding of "defect"); see also In re Standard Jury Instructions, 198 So.2d 319 (Fla. 1967) (officially adopting standard instructions). At least some other jurisdictions have agreed that a product may be negligently designed or manufactured but contain no "defect." See, e.g., Hasson v. Ford Motor Co., 19 Cal.3d 530, 138 Cal. Rptr. 705, 564 P.2d 857, 864-66 (1977); Toner v. Lederle Laboratories, 828 F.2d 510, 513-14 (9th Cir. 1987) (applying Idaho law), cert. denied, 485 U.S. 942 (1988). Thus even aside from the warning issue, this verdict was not inconsistent. And even more clearly, these are not issues warranting this court's attention.

In short, this verdict was not inconsistent. The Joneses are private individuals with no stake in the legal issue of waiver, which ultimately will not affect the validity of their judgment. This court should not grant a writ of certiorari to consider an issue the Eleventh Circuit correctly said it "doubt[ed]" would make a difference in the outcome of the case.

II. THIS WAS NOT A RULE 49(a) VERDICT

At least nine circuits apparently agree that a party waives any objection to inconsistency of a Rule 49(b) verdict by failing to raise the issue prior to discharge of the jury, at least in most circumstances.[5] Toro itself seems to accept this rule. See Petition for Writ of Certiorari at 10-11 & n.7. The conflict relied upon by Toro relates only to Rule 49(a) verdicts.

Rule 49(a) addresses the situation where the court submits to the jury "*only* a special verdict in the form of a special written finding upon each *issue of fact.*" Federal Rule of Civil Procedure 49(a) (emphasis added). Rule 49(b) addresses the distinct situation of a general verdict accompanied by additional interrogatories. This case involves the latter.

Here the court's first two questions to the jury asked in effect for a general verdict on each of the two counts.

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[5] See, e.g., Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982), aff'd sub nom. Chardon v. Soto, 462 U.S. 650 (1983); Haskell v. Kaman Corp., 743 F.2d 113, 123 (2d Cir. 1984); White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir.), cert. denied, 110 S.Ct. 406 (1989); Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 534-35 (5th Cir. 1974); Tennessee Consolidated Coal Co. v. United Mine Workers, 416 F.2d 1192, 1200-01 (6th Cir. 1969), cert. denied, 397 U.S. 964 (1970); Cundiff v. Washburn, 393 F.2d 505, 507 (7th Cir. 1968); Lockard v. Missouri Pacific R.R. Co., 894 F.2d 299, 304 (8th Cir. 1990), cert. denied, 59 U.S.L.W. 3235 (Oct. 1, 1990); Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416, 1422 (10th Cir.), cert. denied, 479 U.S. 1007 (1986); Golub v. J. W. Gant & Associates, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989).

Each was a single ultimate mixed question of law and fact intended to determine the outcome on that count. If this is not a Rule 49(b) verdict, then the distinction between Rules 49(a) and (b) is indeed one of form over substance.

To be sure, the Eleventh Circuit referred to this as a Rule 49(a) verdict. Toro did not raise inconsistency of the verdict in its initial brief in the Eleventh Circuit; Toro's initial brief cited neither Rule 49(a) nor Rule 49(b) nor any case dealing with waiver of inconsistency. The Joneses, in their single brief in the Eleventh Circuit, thus had no occasion to address which type verdict this was; the Joneses cited neither rule in their brief. In its reply brief, to which the Joneses had no opportunity to respond, Toro claimed inconsistency of the verdict, stated without analysis that this was a Rule 49(a) verdict, and completely mischaracterized the Eleventh Circuit's waiver cases. The Eleventh Circuit, in a "Do Not Publish" opinion designed to reject Toro's mischaracterization of the Eleventh Circuit's waiver cases, and without the benefit of briefing on what type verdict this really was, repeated without analysis Toro's statement that this was a Rule 49(a) verdict. In short, this issue has never been briefed in this case at any level.

Properly analyzed, this case involves Rule 49(b). Toro's reliance on Rule 49(a) cases thus is misplaced.

III. TORO FAILED TO RAISE FULLY IN THE ELEVENTH CIRCUIT THE ISSUE IT SEEKS TO PRESENT HERE

Toro's initial brief in the Eleventh Circuit did not raise as an issue the alleged inconsistency of the verdict. The Joneses, in their single brief in that court, addressed any claim of inconsistency only very briefly, in an (unsuccessful) effort to prevent Toro from raising the issue in its reply brief with no opportunity for the Joneses to respond at all.

This case comes here based on a "Do Not Publish" opinion that responds to Toro's mischaracterization of Eleventh Circuit precedents and does not set forth the court's full analysis of this issue. This is not the record on which this court should address any conflict among the circuits, even if otherwise appropriate for review.

IV. THE ELEVENTH CIRCUIT'S DECISION IS CORRECT

Any alleged inconsistency in a verdict can be clarified or cured very easily if the issue is promptly raised, before discharge of the jury. By resubmitting the issue to the jury with further instructions as needed, the necessity for a retrial is avoided. Rule 49(b) expressly allows such resubmission, and courts thus have held that failure to raise inconsistency of a Rule 49(b) verdict prior to the jury's discharge—when the inconsistency can be obviated—waives any objection. See footnote 5, supra.

There is no reason for a different result under Rule 49(a). Nothing in that rule prohibits a court from resubmitting an issue to the jury to resolve any inconsistency. *See, e.g., Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1178 (5th Cir. 1987). Under Rule 49(a), just as under Rule 49(b), any inconsistency can be cured if promptly raised.[6]

The appropriateness of the waiver rule is well illustrated here. This trial was perfect, or as nearly perfect

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[6] The only colorable argument for a different waiver rule under Rules 49(a) and (b) might be that (i) under Rule 49(b), there is a general verdict disclosing which party the jury thought should win each count, notwithstanding any inconsistency in the jury's answers to subsidiary factual questions, whereas (ii) under Rule 49(a), there are "only" answers to specific "factual" questions and no general verdict, so that an inconsistency might prevent the court from knowing which side the jury really supported on a given count. If this is the rationale, then the verdict here—which clearly reflects the jury's determination of which side should win each count—must be characterized as a Rule 49(b) verdict, unquestionably subject to the waiver rule.

as any ever is. There were no objections to the jury selection process. There were no disputed evidentiary rulings. There were no objections to the jury instructions. There were no objections to the form of verdict. There were no objections to the court's conduct of the trial in any respect. If Toro really thought the verdict was inconsistent, it could have raised the issue, and further interrogatories to the same jury would have resolved the dispute. Instead, Toro stood silent, the jury was discharged, and Toro now seeks to compel an unnecessary retrial by a district court that conducted a perfect trial.

Neither the court system nor most litigants have the resources to retry cases for no good reason. There is no good reason to allow a party to sandbag a district court and force a retrial that easily could be avoided. *See, e.g., Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir. 1982) (waiver rule's purpose is to "promote the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for a new presentation of evidence to a different body"), *aff'd sub nom. Chardon v. Soto*, 462 U.S. 650 (1983).

V. THIS ISSUE DOES NOT WARRANT THIS COURT'S ATTENTION

This is a diversity case that produced a brief "Do Not Publish" opinion in the court below. The case will have no precedential value. This court does not sit to review decisions that will affect only the private litigants to the single case on which review is sought.

Whether this was a Rule 49(a) or 49(b) verdict—an issue never briefed in the court below—is not an issue that warrants this court's attention. Whether this verdict was inconsistent under Florida law relating either to warnings or to negligent design and manufacture is not a question that warrants this court's attention. This court ought not reach out to address a conflict among the circuits relating solely to Rule 49(a) in a vacuum, without

attention to what type verdict this really was and whether it was inconsistent at all.

Moreover, the issue of whether inconsistency in a Rule 49(a) verdict is waived if not timely raised is not a question warranting this court's attention, even in a case (unlike this one) where the issue is well presented.

First, the waiver rule affects no constitutional rights. It apparently is undisputed that objections to inconsistent Rule 49(b) verdicts are waived if not promptly made; surely there is no *constitutional* difference between Rules 49(a) and (b). This is simply not a constitutional issue in any form or fashion.[7]

Second, there is no need for national uniformity on this, any more than there is a need for national uniformity regarding the many other trial procedures now treated differently in different circuits or districts, such as the sequence in which the parties exercise peremptory challenges or the number of jurors in civil cases. If courts in the Ninth Circuit choose to retry cases unnecessarily, that is no reason why courts in the Eleventh must do so. This court ought not grant a writ of certiorari.

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[7] In asserting the contrary, Toro cites cases trumpeting the sanctity of jury verdicts. See Petition for Writ of Certiorari at 7-8. It is indeed ironic that a party that clearly lost before the jury now seeks to take away its adversary's jury verdict by citing decisions holding that such verdicts must be upheld whenever possible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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